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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, AND F.E. UITHOVEN, G.E. UITHOVEN, CARRIE UITHOVEN, DAVID ASHMORE, PAUL THORNE, AND JAMES L. YOUNG

Petitioners

VERSUS

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is it a legally insufficient defense within the meaning of Rule 12(f) of the Federal Rules of Civil Procedure for a landowner to assert that the United States of America may not condemn property listed on the National Register of Historic Places under the provisions of the National Historic Preservation Act of 1966, 16 USC 461 et seq (hereinafter referred to as "NHPA") before it complies with NHPA and implementing procedures for compliance promulgated by the Advisory Council on Historic Preservation at 36 C.F.R. §800.1 et seq?

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OPINIONS BELOW

The opinion of the District Court is unreported. It is reproduced in the Appendix hereto.

The opinion of the Court of Appeals for the Fifth Circuit is reported at 639 F.2d 299. It is also reproduced in the Appendix hereto.

GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The judgment of the Court of Appeals was entered on March 13, 1981. The time of entry was not recorded by the Court of Appeals. A petition for rehearing and a suggestion for rehearing en banc were timely filed but denied on April 15, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND REGULATIONS WHICH THE CASE INVOLVES

The Declaration of Taking Act (hereinafter referred to as "DOTA") provides in pertinent part:

> [T]he petitioner may file in the cause...a declaration of taking signed by the authority empowered by law to acquire the lands.... Upon the filing of said declaration of taking and of deposit [of estimated just compensation]... title shall vest in the United States and said land shall be deemed to be condemned and taken for the use of the United States....
>
> (40 U.S.C. §258(a))

NHPA provides in pertinent part:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal Department or independent agency having authority to license any undertaking shall prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take in account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under

> section 470i and 470t of this title, a reasonable opportunity to comment with regard to such undertaking. (Emphasis supplied)(16 U.S.C. §470(f))

This case also involves the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. §800.1 et seq. These regulations are lengthy and pertinent provisions thereof are reproduced in the Appendix hereto.

STATEMENT OF THE CASE

This is an eminent domain action instituted by the United States of America pursuant to DOTA. The action was filed at the request of the Secretary of the Army to obtain Petitioners' property for use in connection with a segment of the United States Army Corps of Engineers Tennessee-Tombigbee Waterway Project known as the Columbus Lock and Dam. The basis for jurisdiction in the Court of first instance was 28 U.S.C. §1358.

An antebellum home, named "Cedar Oaks," is located on the subject property. The property has been in the Uithoven family since 1913 and is part of the "Colbert-Barton Townsites" which are individually listed on the National Register of Historic Places under the provisions of the National Historic Preservation Act of 1966, 16 U.S.C. §470(a) as an "historic site." 43 Fed. Reg. #26, February 7, 1978, p. 5210.

The action was commenced on February 14, 1978 by Complaint. On February 24, 1978, in response to a Government motion, the District Court entered a Judgment on Declaration of Taking vesting title in the property to the Government.

The Defendants, Petitioners in this Court, timely filed their answer and asserted an affirmative defense to the condemnation, to-wit, that the property was listed on the National Register of Historic Places and therefore could be condemned only after

the Government had complied with NHPA, related Executive Order 11593 and implementing procedures for compliance promulgated by the Advisory Council on Historic Preservation.

The Government then filed a motion to strike this defense. After hearing, the District Court granted the motion to strike based on the reasoning that while the Government is bound by these laws, it is not required to comply with these laws until after it has condemned the property which is listed on the National Register of Historic Places. The basis for the decision of the District Court was as follows:

> There must be many historic sites either presently listed or qualified for listing in the Register. To place a burden such as Defendants propose on the Corps of Engineers in the acquisition of land for use in the Tennessee-Tombigbee Waterway Project would unnecessarily impede and delay the completion of the project.

The parties then stipulated to the just compensation payable to Petitioners

in the event the Government had the legal right to condemn the property. In this stipulation, Petitioners specifically reserved their rights to appeal the legal issue as to the validity of the condemnation.

Final judgment was entered on August 19, 1980, and a Notice of Appeal was filed on August 25, 1980.

Thereafter, Petitioners moved the District Court to grant a stay pending appeal, but the District Court overruled this motion on September 2, 1980.

Subsequent motions for stay pending appeal and expedited appeal were granted by the Court of Appeals for the Fifth Circuit on or about September 17, 1980.

Following oral argument, the Court of Appeals rendered its opinion on March 13, 1981, holding as follows:

> That portion of the opinion and judgment below which strikes noncompliance with the NHPA as a defense to

> the condemnation itself will be affirmed, but that portion which leaves "only the question of just compensation for the court's consideration" will be vacated, and we remand the cause so that the district court may determine, on petition of the Uithovens, whether compliance has taken place. If the court finds to the contrary, it must then decide what remedial action is appropriate.

An Application for Rehearing and a Suggestion for Rehearing En Banc were subsequently denied. Thereafter, the Court of Appeals stayed its mandate pending final disposition by this Honorable Court.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

The Court of Appeals Has Decided an Important Question of Federal Law, Which Has Not Been, But Should Be, Settled by This Court

Petitioners contend that 16 U.S.C. §470f requires that the United States Government comply with the regulatory procedures established pursuant to that Section before it can lawfully condemn property under DOTA, 40 U.S.C. §258a.

16 U.S.C. §470f provides as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking[1] or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or

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[1] The regulations of the Advisory Council on Historic Preservation clearly include a "condemnation" as an "undertaking." The Advisory Council regulations define "undertaking" as:

> (c) "Undertaking" means any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance or support of any non-Federal action, activity, or program. Undertakings include new and continuing projects and program activities (or elements of such activities not previously considered under Section 106 or Executive Order 11593) that are: (1) Directly undertaken by Federal agencies; (2) supported in whole or in part through Federal contracts, grants, subsidies, loans, loan guarantees, or other forms of direct and indirect funding assistance; (3) carried out pursuant to a Federal lease, permit, license, certificate, approval or other form of entitlement or permission; or (4) proposed by a Federal agency for Congressional authorization or appropriation. 36 C.F.R. §800.2.

> eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i and 470t of this title a reasonable opportunity to comment with regard to such undertaking. (Emphasis supplied)

The procedures for compliance with Section 470f are established by regulations found at 36 C.F.R. §800.1, et seq. An elaboration of the procedures is unnecessary for the resolution of this case.

All parties agree that the law is settled that under DOTA, title automatically vests in the government upon the filing of a declaration of taking and payment into the registry of court the estimated just compensation, subject, however, to the right of the condemnee to show that the government lacks authority to condemn.

Petitioners contend that since DOTA requires expenditure of federal funds at the time of the filing the Declaration of Taking, the plain language of Section 470f dictates the government comply with Section

470f and regulations promulgated pursuant to it before filing the Declaration of Taking. Should the government condemn without complying, the condemnee can assert the government's noncompliance as a defense to the condemnation. The defense is in the nature of a plea in abatement, preventing condemnation until such time as the government complies. See, e.g., United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970) and Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

The public importance of this case derives both from its subject matter and its novelty. The decision of the Court of Appeals herein is the first Circuit Court decision on this issue, and there have been only three district court decisions on the point, and these are in conflict.[2]

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[2] United States v. 4.18 Acres of Land, Civil No. 3-74-33 (D. Idaho February 20, 1975) holds that compliance with Section 470f is a statutory prerequisite to condemnation of an historical site. Peti-

(footnote continued next page)

The subject matter involves the construction and reconciliation of NHPA and DOTA, federal statutes governing the broad powers of the government to condemn private property and the expressed intent of Congress to further historic preservation. The public interest in the proper application of these laws is apparent. Petitioners submit that the opinion of the Court of Appeals is both contrary to the plain meaning of NHPA and the clearly expressed will of Congress, but is likely to have an especially influential impact on the future development of the law and the practices of federal agencies.

Section 470F of NHPA explicitly requires compliance with the Act and implementing

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tioners commend the reasoning of the district court in that decision to the Court's attention and have reproduced the opinion in the Appendix hereto. United States ex rel. TVA v. Three Tracts of Land, 415 F. Supp. 586 (E.D. Tenn. 1976) holds that the government need comply with NHPA only after condemnation. United States v. 45,149.48 Acres of Land, 455 F.Supp. 192 (E.D. N.C. 1978) holds Section 470f is no defense to condemnation, but no reasoning is given.

regulations "prior to the approval of the expenditure of any federal funds on the undertaking." (Emphasis Supplied) See 36 C.F.R. §800.1 et seq (especially 800.4). The Government cannot obtain ownership of the land without first paying just compensation. The payment of just compensation is obviously an expenditure of Federal funds on the undertaking, rendering the Act and the regulations fully operable. Nevertheless, the Court of Appeals' decision exempts from the requirements of NHPA the approval of the expenditure of federal funds for the acquisition of title and effectively holds that DOTA impliedly amends NHPA. Based on its construction of the two (2) statutes, the Court of Appeals concluded (Appendix pp. 15-16):

> [W]here it has been long established that the role of the district court in DOTA condemnations is limited to a bare consideration of the legal authority to take, and where the courts have been careful to refrain from considering matters of propriety, expediency

> and policy with regard to the use of the property sought, we conclude that only an express statement of Congress that NHPA noncompliance is a defense to a condemnation itself would be sufficient to achieve that result. While it may seem that the asserted defense would promite the purposes of the NHPA by creating a means of enforcement to give it "teeth" it is manifestly apparent that only Congress can make such a judgment.

We respectfully submit that this construction of the two (2) statutes departs from established principles of statutory construction.

In the first place, NHPA is explicit, clear and unambiguous.[3] As such, it should be applied as written and not held to be impliedly amended by DOTA. As recently stated by this Court in Consumer Product Safety Commission v. GTE Sylvania, 100 S.Ct. 2051 (1980) at 2056:

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[3] The breadth of NHPA does not render the statute ambiguous because the Congressional objective of historic preservation requires broad statutory terms. Cf. Diamond v. Chakrabarty, 100 S.Ct. 2204 (1980).

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

See also Andrus v. Sierra Club, 99 S.Ct. 2335 (1979) in which this Court stated at 2340:

> When Congress has thus spoken "in the plainest of words". . . we will ordinarily decline to fracture the clear language of a statute, even for the purpose of fashioning from the resulting fragments a rule that "accords with common sense and the public weal."

As stated in Sutherland, Statutory Construction:

> One of the most common of insights about the process of communication was given classic expression by the Supreme Court of the United States in the declaration that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, ...the sole function of the courts is to enforce it according to its terms. (citing Caminetti v. United States, 37 S.Ct. 192 (1917)
> * * *
> There is no safer nor better settled canon of interpretation than that when language is clear and unam-

biguous it must be held to mean what it plainly expresses. ($46.01)(citing Swarts v. Steiger, 117 F. 13 (8th Cir. 1902)

* * *

Thus, a "clear and unambiguous" statutory provision generally is one having a meaning that is not contradicted by other language in the same act. For example, the Supreme Court of the United States has said:

> Although the spirit of the instrument, especially of the Constitution, is to be respected not less than its letter yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation. Where words conflict with each other, where the different clauses of the instrument bear upon each other and would be inconsistent unless the nature and common import of the words be validated, interpretation becomes necessary; and to depart from the obvious meaning of words is justifiable. Yet, in most cases, the plain meaning of a provision not contradicted by any other provision in the same instrument, is not to be disregarded because we believe the framers of the instrument could not intend what they say. It must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hesitation,

> unite in rejecting the application. (§46.04)(citing Sturges v. Crownin-Shield, 4 L.Ed. 529 (1817)) (Emphasis supplied)

We respectfully submit it is not within the province of the Court of Appeals to restrict the application of Congressional enactments unless exceptional circumstances are present:

> This Court, in interpreting the words of a statute has "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results...or would thwart the obvious purpose of the statute' ... but it is otherwise 'where no such consequences would follow and where...it appears to be consonant with the purposes of the Act....' " (Citations omitted) Mobil Alaska Pipeline Co., et al v. United States, 436 U.S. 631, 643, 98 S.Ct. 2053, 56 L.Ed.2d 591, 601 (1978).

See also Commissioner of Internal Revenue v. Brown, 85 S.Ct. 1162 (1965) at 1166.

Secondly, we respectfully submit that it is erroneous to hold that NHPA and DOTA are in conflict and that DOTA impliedly amends NHPA to apply to the approval of any federal funds on the undertaking, other than for condemnation. It is a well estab-

lished principle of statutory construction that amendments by implication, like repeals by implication, are not favored. See, for example, United States v. Wèlden, 84 S.Ct. 1082 (1964) at 1087, N. 12. The proper resolution of the issue presented in this action requires that DOTA and NHPA be read and considered together. It is an axiomatic principle of statutory construction that, in the absence of exceptional factors, words will be given their ordinary meanings and where different statutes apply to a case, they will be read in such a way as to reconcile their application:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Morton v. Mancari, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290, 301 (1974).

Likewise, in Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) the Court made it clear at 1133 that NHPA should be "read into" the

agency's authority. The Court reasoned that NHPA is a "mandatory" and "unequivocal command" to federal agencies (1137 at N.31) and that applicable federal statutes should be read in para materiae and reconciled, unless there is a clear conflict in statutory terms, so as to effectuate all statutory requirements. See also United States V. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970), and United States v. 18.2 Acres, 442 F.Supp. 800 (E.D. Cal. 1977) at 807.

Nevertheless, rather than reconciling the two statutes when, as in this case, the government seeks to condemn property listed on the National Register, the opinion of the Court of Appeals impliedly amends NHPA and rejects its clear statutory command that the government must comply with the Act and implementing regulations "prior to the approval of the expenditure of any Federal funds on the undertaking." (Emphasis

Supplied)

NHPA and DOTA may be easily reconciled by holding that until the Corps of Engineers properly complies with the statutory prerequisites established by Congress, the government is not authorized to proceed with the condemnation of any historic site listed on the National Register of Historic Places. In the statutory terms of DOTA, the agency is not "empowered by law to acquire" unless and until it complies with procedural requirements mandated by Congress. Noncompliance should be a defense to the condemnation because of the well settled jurisprudential rule[4] noted (Appendix p. 12) in the decision of the Court of Appeals that a condemnee may challenge "the validity of

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[4] Indeed, the "lack of authority" defense to condemnation is purely jurisprudential and for that reason alone it seems incongruous that the Court of Appeals would hold that if NHPA was to be considered a defense it would require an express statement by Congress.

the taking for departure from the statutory limits."

Third, even if the two (2) statutes do conflict, and we respectfully submit that they do not, it is erroneous for the Court of Appeals to hold that DOTA impliedly amends NHPA. DOTA was enacted in 1931 and NHPA was enacted in 1966. It is a well established principle of statutory construction that in the event of a conflict in statutory terms, the latest declaration of Congress prevails. Sutherland, Statutory Construction, at §22.22, citing United States v. Yuginovich, 41 S.Ct. 551 (1921). Therefore, if there is to be any implied amendment of the two (2) statutes, NHPA should be held to impliedly amend DOTA.

Fourth, the Court of Appeals notes (Appendix p.16) that "it may seem that the asserted defense would promote the purpose of the NHPA by creating a means of enforcement to give it 'teeth.' " Nevertheless, the

Court of Appeals declined to construe the statute in such a manner as to effectuate the Congressional purpose. In so doing, we most respectfully submit that the Court of Appeals did not follow the rule of statutory construction that it is the task of the courts to "interpret the words of those statutes in light of the purposes Congress sought to serve." Chapman v. Houston Welfare Rights Organization, 99 S.Ct. 1905 (1979) at 1911.

Fifth, the narrow interpretation of NHPA as is implicit in the decision of the Court of Appeals contravenes statutory construction principles mandated by the National Environmental Policy Act, 42 U.S.C. §4321 (hereinafter referred to as NEPA). NEPA expresses a strong federal policy in favor of preserving the natural environment, including our "historic and cultural heritage." 42 U.S.C. §4331. To this end, Congress has directed that "to the fullest

extent possible," all laws, regulations, and policies of the United States should be interpreted and administered in accordance with the policies of NEPA.[5] 42 U.S.C. §4332(1); Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) at 1132, N. 4.

If the two statutes are read and considered together, the plain and precise language of Section 470f clearly requires that the agency seeking to condemn must first comply with Section 470f. This

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[5] Compare analogous NEPA cases holding that there must be procedural compliance at a time which will be meaningful in view of Congressional dictates that agencies fully disclose impacts and give full consideration to alternatives. See, for example, Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1108, 1128 (D.C. Cir. 1971); City of Boston v. Volpe, 464 F.2d 254, 257 (1st Cir. 1972); Environmental Defense Fund v. TVA, 468 F.2d 1164 (6th Cir. 1972); Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079, 1093-1094 (D.C. Cir. 1973); Rhode Island Committee on Energy v. General Services Administration, 397 F.Supp. 41, 55-61, (D.R.I. 1975). Surely, compliance is not meaningful if it comes after the agency makes a decision as to the location of a project and the use of a particular piece of property and expends funds and resources in implementing that decision.

construction in no way departs from the authorities holding that the only defense to a DOTA condemnation is lack of authority to take and that district courts do not properly consider matters of propriety or expediency. The position of Petitioners would merely require that the condemning agency comply with NHPA and consider historic preservation factors before exercising its discretionary decision making authority to condemn National Register property and spending federal funds to implement its decision.

The wisdom of the Congressional NHPA mandate lies in the fact that it requires an agency to consider the effect of condemning National Register property before, not after, the taking. After the taking, the agency is "locked in" to the use of the particular land and the consideration of alternative locations as a means of mitigating damage becomes truly a "pro

forma ritual." Moreover, once property is in the hands of the government, the alternative of preservation through private initiative is, for all practical purposes, dead. Indeed, the Congressional declaration of policy on NHPA clearly recognizes the importance of private preservation efforts and seeks to further encourage such efforts by the passage of the Act.[6]

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[6] 16 U.S.C. §470 states as follows:

The Congress finds and declares:

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and

(footnote continued next page)

The wisdom of the congressional scheme is ignored, however, by the opinion of the Court of Appeals, and in its place is substituted the requirement that the government comply only after condemnation. Petitioners respectfully submit that this ignores Congressional intent and substitutes the judgment of the Court for that of Congress[6] on the procedures agencies

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(d) that, although the major burdens of historic preservation have been borne and major effects initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and acitvites. (Emphasis supplied)

[6] Nothing in the legislative history of NHPA indicates that Congress meant for condemnation to be an exception to the requirements established by section 470f. See, 1966 United States Code Congressional and Administrative News 3307, et seq. For a cogent analysis of the legislative history, see Watch v. Harris, 603 F.2d 310 (2nd Cir. 1979) wherein it was observed at 323 that NHPA's "legislative

(footnote continued next page)

must follow.[7]

Furthermore, the Court of Appeals' holding that the taking of title is "environmentally neutral"[8] is explicitly contrary to the regulations of the Advisory Council on Historic Preservation.

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history reveals a determination to protect historic properties at every stage where the agency approves funding...."

[7] The corollary of the rule that the judiciary should not supplant its judgment for that of Congress or the Executive Branch on the "wisdom" of condemnations is that the judiciary should not supplant its judgment for that of Congress on the question of the procedures agencies are to follow in carrying out their delegated responsibilities. As this Court held in Berman v. Parker, 348 U.S. 26 (1954) at 33, the power of eminent domain is merely a means to the end and the means by which it will be attained is for the Congress to determine.

[8] Realistically, the "taking" and the "use" cannot be separated because, for all practical purposes, a condemnation action, by its very nature, is a decision to put private land to a certain public use, which may have a significant effect on the environment. See United States v. 18.2 Acres of Land, 442 F.Supp. 800 (E.D. Cal. 1977) at 807 and United States v. 247.37 Acres of Land, 3 ERC 1098 (S.D. Ohio 1971) at 1104.

In the first place, a condemnation is clearly within the regulations' meaning of an "undertaking." 36 C.F.R.§800.2. Secondly, the regulations define "effect" as follows:

> An undertaking shall be considered to have an effect whenever any condition of the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural characteristics that qualify the property to meet the criteria of the National Register. (Emphasis Supplied)
> * * *
> An effect may be direct or indirect. Direct effects are caused by the undertaking and occur at the same time and place. Indirect effects include those caused by the undertaking that are later in time or further removed in distance, but are still reasonably foreseeable.
> (36 C.F.R. §800.3)

The Advisory Council's long-standing interpretation of the term "effect" is further explained in J.M. Fowler, "Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law," 12 Wake Forest L.Rev. 31 (1976) at 56 as

follows:

> It should be noted that the relationship of the undertaking to the effect need not be one of immediate causation. The criteria specify that if the undertaking causes or may cause a change in the property's significant qualities, it is considered to have an effect on the property. Where federal involvement forms an integral link in the chain of events that ultimately create upon a National Register property, NHPA requires that the administrative agency comply with the section 106 review process. Examples of cases brought before the Council on this basis include the proposed transfer by federal agencies of the San Francisco Mint and Old Post Office in St. Louis to local authorities for ultimate demolition, and the granting of a right-of-way by the National Park Service over the Gettysburg Battlefield to a private developer which would assist the construction of a 300 foot observation tower adjacent to the battlefield. These cases evidence the Council's interpretation that, even when the federal action is not in itself adverse, the nature of the ultimate effect made possible by federal involvement is sufficient to establish the necessary causal relationship to activate section 106.

The judicial deference accorded guidelines of the Council on Environmental Quality for compliance with NEPA indicates by

analogy that the Advisory Council's procedures are entitled to considerable weight in the interpretation of NHPA. Andrus v. Sierra Club, 99 S.Ct. 2335 (1979) and Greene County Planning Board v. FPC, 355 F.2d 412 (2nd Cir. 1972). The Advisory Council was created by NHPA and charged in that statute with the responsibility to advise the President and Congress, as well as state and federal agencies, on matters relating to historic preservation. 16 U.S.C. §470i and §470j. We therefore respectfully submit that the Courts should give "substantial deference" to the Advisory Council's interpretation of NHPA.

Moreover, the Court of Appeals' implicit finding that agency decisions to condemn National Register properties are unreviewable for NHPA compliance contravenes well established principles of administrative law. The Court of Appeals held that a showing of NHPA non-compliance may

warrant remedial action including the withholding of possession or the issuance of injunctive relief. However, in the opinion of the Court of Appeals, NHPA noncompliance would have no effect on the agency decision to condemn the property. In so holding, we respectfully submit that the Court of Appeals has effectively shielded agency decisions to condemn National Register property from judicial review for NHPA compliance. We respectfully submit, as previously stated, that the decision to exempt the condemnation of National Register property from NHPA is contrary to well established principles of statutory construction. Moreover, we respectfully submit that the Court of Appeals' decision to make the question of condemnation unreviewable for NHPA compliance is contrary to well established principles of administrative law. As stated by this Court in Abbott Laboratories v. Gardner, 87 S.Ct. 1507 (1967) at 1511:

> A survey of our cases shows that judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress... only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.

See also Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co., 415 F.2d 403 (5th Cir. 1969) at 413, N. 20. Similarly, in Citizens to Preserve Overton Park v. Volpe, 91 S.Ct. 814 (1971), this Court held that the Administrative Procedures Act, 5 U.S.C. §701, makes agency decisions reviewable except where there is a statutory prohibition of review or where the "agency action is committed to agency discretion by law." In the instant case, there is no "clear and convincing" evidence that agency decisions to condemn National Register property are to be unreviewable. There is no statutory prohibition of review. And it is well settled that agency decisions to condemn are not committed to the unbridled

discretion of the agency because, as noted by the Court of Appeals (Appendix p.13) it is well settled that judicial review may be had of the issue of whether the limits of authority were exceeded.[9] This is precisely what we seek in this case. We do not seek to have the Court review the necessity, propriety, expediency or policy of the government's decision to condemn this land. Such matters may well be committed to the discretion of the agency. But, we do seek to have the Court review the agency's compliance with the procedural law. We respectfully submit that it has never been our law that questions of agencies' compliance with procedural laws are committed to the unbridled discretion of the agencies. All governmental decisions must be made in

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[9] While, as noted by the Court of Appeals (Appendix p.12)the decree of the transfer of title may be almost ministerial procedurally, there is no reason why this necessarily must be the case in a situation where there is a serious question as to the legality of the agency actions.

accordance with the procedural requirements established by Congress and decisions to condemn National Register property should be no different.

The Court of Appeals Has Decided a Federal Question in a Manner Which Is In Conflict With a State Court of Last Resort

The Court of Appeals decision is in conflict with the decision of the Florida Supreme Court in Seadade Industries, Inc. v. Florida Power & Light Co., 275 So.2d 209 (1971) which decided the broader question of whether the failure to comply with environmental procedural requirements is a defense to a condemnation. See also Gibson v. Ruckelshaus, 3 ERC 1028 (E.D. Tex. 1971) and Nichols, Eminent Domain, (Vol. 7 §14.04.)[10]

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[10] Although NHPA and NEPA are similar in purpose, we must point out that there are significant differences in statutory language. NEPA, 42 U.S.C. §4332(2)(C), requires an environmental impact statement only of "major Federal actions" significantly affecting the quality of the human

(footnote continued next page)

CONCLUSION

The decision of the Court of Appeals in this case is the first Circuit Court of Appeals decision on this important issue of law and public policy. The District Court decisions are divided. The Court of Appeals' decision conflicts with a decision of the Florida Supreme Court. Two very important statutes are involved, and the decision of the Court of Appeals, if left standing, will govern the practices

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environment." CEQ recognizes that the words "major" and "significant" are intended to imply thresholds of importance and impact that must be met before a statement is required. See 40 C.F.R. part 1500 et seq, including, without limitation, §1508.18 and §1508.27. Unlike NEPA, NHPA extends no discretion to federal agencies to determine whether the activity in question meets a certain threshold of significance if that activity affects National Register property. The lack of a qualifying word, such as "major," for actions covered by NHPA, is indicative of the broader reach of NHPA insofar as National Register properties are concerned. NHPA is explicit that "any" federal action is subject to the Advisory Council's procedures, if that action affects National Register property. See Environmental Law Institute, Federal Environmental Law (1974) at 1496.

of federal agencies with regard to the condemnation of National Register properties. Despite its precedental importance, the opinion of the Court of Appeals conflicts with the plain terms of 16 U.S.C. §470(F) and its implementing regulations, is contrary to the expressed Congressional policies of NHPA and departs from accepted principles of statutory construction.

We therefore respectfully conclude that this Petition for Writ of Certiorari should be granted.

Respectfully Submitted:

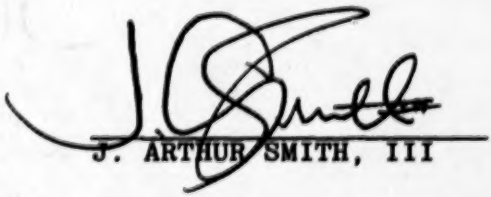


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CERTIFICATE OF SERVICE

I do hereby certify that three (3) copies of the above and foregoing have been mailed, postage prepaid, United States Mail, addressed to counsel of record at his post office address, Mr. Jacques Gelin, Attorney, Appellate Section, Land and Natural Resources Division, United States Department of Justice, Washington, D.C., 20530, and that three (3) copies have been mailed, postage prepaid, United States Mail, to the Solicitor General, Department of Justice, Washington, D.C., 20530, this 27th day of May, 1981.



J. ARTHUR SMITH, III